Supreme Court, U.S.
FILED
APR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1496

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

JAMES WILLIAM GILLIAM, II,
Petitioner,

v.

NATIONAL COMMISSION ON CERTIFICATION
OF PHYSICIAN ASSISTANTS, INC., ET AL.
Respondents.

RESPONDENT NCCPA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES H. IVY*
JOSEPH C. CHANCEY
Scoggins, Ivy & Goodman, P.C.
2800 Marquis One Tower
245 Peachtree Center Ave., NE
Atlanta, GA 30303
(404) 659-1000

JAMES G. ROSENBERG
DOUGLAS F. SCHLEICHER
Saul, Ewing, Remick & Saul
3800 Centre Square West
Philadelphia, PA 19102
(215) 972-7777

* Counsel of Record
April 23, 1990

BEST AVAILABLE COPY

I. QUESTIONS PRESENTED FOR REVIEW

This case offers very little to review. It was dismissed by the district court after review of a voluminous factual record, and the dismissal was affirmed by the court of appeals, without written opinion, in a judgment order. As a result of the procedural posture of the case, the only material legal issue is as follows:

Did the court of appeals properly affirm the district court's dismissal of this action with prejudice, based upon review of a voluminous factual record, when the petitioner, plaintiff below, had already filed several amendments to his Complaint and had exhaustively described the factual and legal bases for his action, and his own pleadings revealed that

he could not sustain a cognizable cause of action?

II. **TABLE OF CONTENTS** *

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

Introduction 6

Statement of Facts. 7

CONCLUSION 13

* There are no authorities cited.

III. STATEMENT OF THE CASE

Petitioner James W. Gilliam, II ("Gilliam"), plaintiff below, is a pro se litigant. He initiated this action against Defendants National Commission on Certification of Physician Assistants, Inc. ("NCCPA")[1], the Commonwealth of Pennsylvania and individual state officers in the United States District Court for the Eastern District of Pennsylvania by filing his Complaint on March 8, 1989. Continuously thereafter, Gilliam purported to supplement and amend his Complaint, without leave of court, by filing numerous and voluminous "briefs," "addenda," "exhibits" and "amendments," wherein he exhaustively described the perceived

---

[1]Respondent NCCPA is a private Georgia non-profit corporation. It has no parent or subsidiary companies or corporations.

factual and legal bases for his causes of action.

Upon appropriate motions by each of the Defendants, and after review of the voluminous record, the district court dismissed this action with prejudice by Order entered November 6, 1989. The dismissal was affirmed by the United States Court of Appeals for the Third Circuit, without written opinion, by Judgment Order entered February 27, 1990. Gilliam's Petition for Certiorari seeks review by this Court of the Third Circuit's Judgment Order.

IV. SUMMARY OF ARGUMENT

Petitioner Gilliam is currently a practicing physician assistant in the State of Delaware. This case involves his attempt to obtain a license to practice as a physician assistant in the Commonwealth of Pennsylvania. Among other prerequisites for licensure, Pennsylvania requires a physician assistant to hold an NCCPA certificate or other evidence of a minimally acceptable level of technical knowledge and skills. In this action, Gilliam attempts to assert claims against NCCPA because he allowed his original physician assistant certificate from NCCPA to lapse, and then failed the NCCPA certifying examination when he attempted to reobtain a certificate. After review of the voluminous record of

Gilliam's filings in the district court, the district court properly dismissed the action with prejudice, and the court of appeals correctly affirmed that order.

Gilliam alleges that NCCPA violated his due process rights under the U. S. Constitution and violated federal anti-trust laws in connection with its certification process. The district court and court of appeals, however, correctly determined that Gilliam could not sustain federal constitutional claims against NCCPA, because NCCPA is a wholly private entity not engaged in "state action." In any event, the district court properly concluded that Gilliam has no constitutionally protected interest in an NCCPA certificate and was afforded all requisite due process in the certification process.

The district court and court of appeals also correctly decided that Gilliam has suffered no injury of the type which the antitrust laws were designed to prevent, and that the conduct alleged on the part of NCCPA does not constitute a violation of the antitrust laws. The inability of Gilliam to obtain a license to practice in Pennsylvania is due solely to the statutory and administrative regulations of that state relating to physician assistants, and to Gilliam's allowance of his original certificate to lapse and his subsequent failure of the certification examination.

This case involves only the application of well-settled law to unique facts. It does not present any important question of federal law, nor does the decision of the court of appeals below stand

in conflict with the decision of any other circuit court of appeals or any state court of last resort. As a result, it offers no issue worthy of review by this Court.

V. ARGUMENT

A. Introduction.

This case involves nothing more than the failure by Petitioner Gilliam, for reasons of personal convenience and expedience, to comply with reasonable and consistent policies of NCCPA concerning the maintenance of his physician assistant certificate on an active basis.

Gilliam's Petition does not present issues proper for or worthy of review on

certiorari by this Court. His case involves only the application of already well-settled law to unique facts. The Third Circuit's Judgment Order does not stand in conflict with any decision of this Court or any other United States court of appeals. Consequently, no useful purpose can be served by further consideration of this case by this Court.

B. Statement of Facts.

In his Petition for Writ of Certiorari, Gilliam omits and misstates material facts in the record of the proceedings below. Furthermore, he recites alleged facts and references documents which have never been introduced, properly or otherwise, as evidence in the record of this case. Consequently, NCCPA takes excep-

tion to Gilliam's statement of the factual background of this case.

The district court's Memorandum and Order, however, which has been included within the appendix to Gilliam's petition, contains a generally accurate and succinct recitation of the material facts within the record of this action. Thus, rather than repeating it herein, NCCPA adopts by reference the factual recitation contained within the Memorandum and Order of the district court, and will confine this factual discussion to portions of Gilliam's petition which require specific refutation.

Initially, it is important to clarify the nature of NCCPA's role. It is not, as Gilliam intimates, a professional association. The physician assistant professional association is the American

Academy of Physician Assistants. Rather, NCCPA is a private corporation which designs and administers examinations intended to measure and certify a minimally acceptable level of the technical knowledge and skills required to practice as a physician assistant. It is not controlled by potential competitors of Gilliam. Consequently, the antitrust authorities cited by Gilliam relating to professional associations are simply inapposite.

Further, in his Petition, Gilliam continues his practice from the lower courts of arguing factual allegations which are completely unsupported by any competent evidence in the record. Specifically, the district court determined that there was no evidence in this case that NCCPA is engaged in "state action."

Indeed, it was clearly established that the operations and procedures of NCCPA do not transform it into a "state actor," and that it operates in all respects on a completely independent basis.

The record reveals that NCCPA receives no financial support from any governmental entity, and that no government entity regulates or controls the decisions, methods or procedures of NCCPA. Although Gilliam attempts to make much of the fact that the U. S. Department of Defense and Federation of State Medical Boards of the U. S. ("FSMBUS") have representatives on the NCCPA board of directors, such entities provide only two of the twenty-two directors on the board. Thus, they can in no way be argued to have any controlling influence on the actions of NCCPA. In any event,

FSMBUS is merely a private association of representatives from a variety of state medical boards, which has no official authority to speak or act on behalf of any state. Consequently, its single voice on the board of directors is not tantamount to involvement by any state.

Finally, Gilliam refers to certain documents which have never been introduced in any fashion in the record of this case, e.g. NCCPA Newsletter, Vol 1/No. 2, April 1976; 1976 Resolution of FSMBUS; and letter dated November 8, 1976, from William L. Bost, Jr. to David L. Glazer. NCCPA, of course, objects to any consideration of such materials, or to any facts allegedly derived from them. Aside from the myriad evidentiary defects relating to such materials, they are

simply irrelevant to the material issues of this lawsuit.

Gilliam's Petition blurs the significant difference between certification as a physician assistant by NCCPA and licensure as a physician assistant by any state. NCCPA certification alone does not authorize a physician assistant to practice in any state. Instead, a physician assistant must obtain a state-issued license to practice in any state which regulates the profession. NCCPA certification has no significance beyond that which any given state chooses to accord. Some states recognize NCCPA certification as satisfying one pre-condition to licensure; others do not. Consequently, the ability of any physician assistant to practice in a given state is controlled directly and exclusively by

the statutory and administrative licensure regulations of that state. In this case, NCCPA cannot prevent Gilliam from practicing in Pennsylvania. It is his failure to satisfy the licensure requirements imposed by that Commonwealth which prevents him from practicing there.

VI. CONCLUSION

In conclusion, this case offers no legal issues of such gravity as to merit consideration by this Court. Indeed, the fact that the Court of Appeals for the Third Circuit summarily affirmed the district court's order of dismissal, without written opinion, reveals that that court felt that this case presents no issue of significant substance, much

less an issue of such novelty or complexity as to demand the attention of this Court. Consequently, Respondent NCCPA requests that Gilliam's Petition for Certiorari be denied.

Respectfully submitted this 23rd day of April, 1990.

CHARLES H. IVY
Ga. Bar No. 385575

JOSEPH C. CHANCEY
Ga. Bar No. 120520

SCOGGINS, IVY & GOODMAN, P.C.
2800 Marquis One Tower
245 Peachtree Center Ave., N.E.
Atlanta, GA. 30303
(404) 659-1000

JAMES G. ROSENBERG
DOUGLAS P. SCHLEICHER
SAUL, EWING, REMICK, & SAUL
3800 Centre Square West
Philadelphia, PA. 19102
(215) 972-7777

CERTIFICATE OF SERVICE

This is to certify that, pursuant to Rule 29.3, I have through my agent caused all parties to this proceeding to be served with three copies of the foregoing Respondent NCCPA's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, before the time of filing same, by first class mail with sufficient postage affixed to ensure delivery, addressed as follows:

Mr. James W. Gilliam, II
6337 Elmhurst Street
Philadelphia, PA 19111

David M. Donaldson, Esq.
Senior Deputy Attorney General
Commonwealth of Pennsylvania
Office of Attorney General
206 State Office Building
Philadelphia, PA 19130

This 23rd day of April, 1990.

Charles H. Ivy, Member of the Bar, U. S. Supreme Court